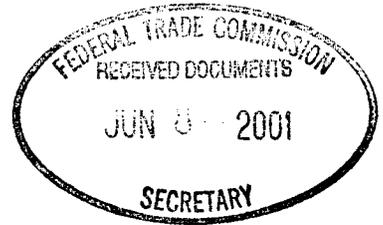


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of)
)

Schering-Plough Corporation,)
a corporation,)
)

Upsher-Smith Laboratories,)
a corporation,)
)

and)
)

American Home Products Corporation,)
a corporation.)
_____)

Docket No. 9297

ORDER ON MOTIONS TO AMEND THE PROTECTIVE ORDER

On May 18, 2001, Complaint Counsel filed its motion to amend the protective order governing discovery material. Complaint Counsel seeks to have Paragraph 5 of the Terms and Conditions of the Protective Order Governing Discovery Material, entered in this matter on May 10, 2001 ("Protective Order"), amended to remove Mark Robbins as a designated individual on behalf of Upsher-Smith. On May 29, 2001, Respondent Upsher-Smith Laboratories, Inc. ("Upsher-Smith") filed its opposition to Complaint Counsel's motion.

On May 29, 2001, non-party KV Pharmaceutical Company ("KV") filed a motion to amend the protective order. KV also seeks to have Paragraph 5 of the Protective Order modified so that Robbins may not be designated as eligible to examine KV's most sensitive information. On June 5, 2001, Upsher-Smith filed its opposition to KV's motion.

On June 8, 2001, KV filed a request for leave to file a reply brief and its reply brief. That request is GRANTED.

The Protective Order Governing Discovery Material, entered in this matter on May 10, 2001, provides in paragraph 5 that:

certain named designated individuals and in-house counsel, not to exceed two attorneys per corporate party, who do not have day to day business responsibilities, shall be provided with access to Confidential Discovery Material, including material designated as "Confidential" and "Restricted Confidential,

Attorney Eyes Only” on the condition that each such in-house counsel or designated executive signs a declaration in the form attached hereto as Exhibit “A” . . .

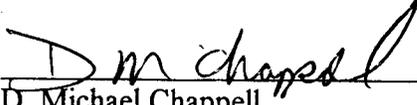
Upsher-Smith listed only one attorney, Mark Robbins, Director of Scientific Affairs, as its designated individual.

It is clear from the filed pleadings that the parties to this dispute agree on the legal standard for determining whether in-house counsel may be denied access to confidential information of a competitor. A request to provide in-house counsel with a competitor’s confidential information “might properly be denied in a case ‘where in-house counsel are involved in competitive decision making,’ a term we defined as shorthand for a counsel’s activities, association, and relationship with a client that are such as to involve counsel’s advice and participation in any or all of the client’s decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor.” *Matsushita Elec. Indus. Co., Ltd. v. Int’l Trade Comm’n*, 929 F.2d 1577, 1579 (Fed. Cir. 1991) (quoting *United States Steel Corp. et al. v. Int’l Trade Comm’n*, 730 F.2d 1465, 1468 (Fed. Cir. 1984)). “Access to confidential information may not be denied solely because of an attorney’s status as in-house counsel. . . . Rather, the decision turns largely on the specific role of in-house counsel within the business: whether he or she has a part in the type of competitive decision-making that would involve the potential use of the confidential information.” *Sullivan Marketing, Inc. v. Valassiscommunications, Inc.*, 1994 U.S. Dist. LEXIS 5824 (S.D.N.Y. 1994) (citing *United States Steel Corp.*, 730 F.2d at 1468-69; other citations omitted).

The parties to this dispute disagree over whether Robbins is involved in competitive decision making. Resolution of this dispute requires evidence indicating whether Robbins’ duties and responsibilities involve Robbins’ advice and participation in any or all of the client’s decisions made in light of similar or corresponding information about a competitor. Further, more complete evidence should be provided regarding the current responsibilities, direct or otherwise, of Robbins, including, but not limited to, any involvement by Robbins in Upsher-Smith’s clinical trials and Robbins’ supervisory responsibilities.

KV’s reply brief will be considered. Complaint Counsel shall have until June 13, 2001, to file a reply brief and provide any additional evidence. Upsher-Smith shall have until June 18, 2001, to reply to arguments raised by KV or Complaint Counsel and to provide any additional evidence.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: June 8, 2001